A

MENTARI HOUSING DEVELOPMENT SDN BHD & ANOR

v.

B

ABDUL GHAPOR HUSSIN & ORS

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
C [CIVIL APPEALS NO: B-02-435-2004,
B-02-1307-2005 & B-02-1308-2005]
14 DECEMBER 2011

D ***LOCAL GOVERNMENT:*** *Town planning - Application for planning permission - Validity of - Whether mandatory provisions for application complied with - Whether exemption of planning permission under s. 19(2)(g) of the Town and Country Planning Act 1976 granted*

E The respondents were the residents of Taman Desaria, Jalan Klang Lama, Petaling Jaya and owners of the neighbouring lands in relation to the Proposed Development in Taman Desaria, Petaling Jaya. The respondents alleged the Proposed Development was illegal and in contravention of the Town and Country Planning Act 1976 ('the Act') being without any valid planning
F permission from the Majlis Perbandaran Petaling Jaya ('MPPJ') and inconsistent with the structure plan, thereby turning the area into an urban slump and transforming the population ratio to ten times what it was supposed to be. The High Court granted a declaration that the planning permission issued by MPPJ for the
G Proposed Development was null and void as it contravened the Act and a declaration that all development works undertaken by the developer, Mentari Housing Development Sdn Bhd ('Mentari') in respect of the development was null and void. MPPJ and Mentari appealed against the decision. The issues to be decided
H by the court were *inter alia*: (i) whether the planning permission granted by MPPJ to Mentari in respect of the Proposed Development under the Act was valid; and (ii) having regard to the facts and contemporaneous documents, more specifically the State Secretary's letter, was there any exemption or valid
I exemption granted pursuant to s. 19(2)(g) of the Act.

Held (dismissing the appeals with costs)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) An application for planning permission must be made pursuant to the detailed procedure prescribed in s. 21(1) to (8) of the Act, more specifically s. 21(6). MPPJ had not complied with the mandatory provisions, *ie*, before the purported planning permission was granted. MPPJ's issuance of the statutory notices and holding of the statutory hearing were in flagrant violation of ss. 21(6), 21(7), 22(1) and 22(2) of the Act, being afterthoughts by way of rescue operations in order to remedy a manifest error. The non-compliance with the mandatory provisions rendered the purported planning permission null and void. (para 28)

(2) MPPJ's reply to the Minister made no reference whatsoever to the exemption, allegedly by the State Authority under s. 19(2)(g) of the Act, but merely informed the Minister that planning permission was approved. Had there been such an exemption, there would have been no necessity for MPPJ to subsequently initiate the process for the statutory hearing under s. 21(6) of the Act. The statutory hearing was clearly repugnant to or inconsistent with the existence of an exemption under s. 19(2)(g). Further, there was no indication or suggestion that Mentari was at the material time aware of the existence of such exemption. (paras 37-39)

(3) Another contemporaneous document was the letter from the Selangor Deputy State Secretary (who was also the Secretary of State Economic Action Council ('SEAC')) to the District Officer and MPPJ attaching the minutes of the SEAC Exco meeting. The minutes made no reference whatsoever that SEAC had granted the exemption under s. 19(2)(g). In any event, only the State Authority is vested with the relevant power to grant the exemption under s. 19(2)(g) and not SEAC. In the circumstances, the purported exemption which SEAC had allegedly granted did not come within the ambit of s. 19(2)(g). (paras 40-42)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden adalah penduduk Taman Desaria, Jalan Klang Lama, Petaling Jaya dan pemilik tanah bersebelahan berkaitan dengan Cadangan Pembinaan di Taman Desaria, Petaling Jaya. Responden-responden mendakwa bahawa Cadangan

A Pembinaan tersebut adalah tidak sah dan bercanggah dengan Akta Perancangan Bandar dan Desa 1976 ('Akta tersebut') kerana tiada apa-apa kebenaran merancang yang sah daripada Majlis Perbandaran Petaling Jaya ('MPPJ') dan tidak konsisten dengan pelan struktur, dengan itu menukar kawasan tersebut kepada B kawasan bandar yang mundur dan mengubah nisbah penduduk kepada sepuluh kali ganda daripada apa yang sepatutnya. Mahkamah Tinggi memberikan satu deklarasi bahawa kebenaran merancang yang diberikan oleh MPPJ untuk Cadangan Pembinaan adalah batal dan tidak sah kerana ia bertentangan dengan Akta C tersebut dan satu deklarasi bahawa kesemua kerja-kerja pembinaan yang dilakukan oleh pemaju, Mentari Housing Development Sdn Bhd ('Mentari') berkaitan dengan pembinaan tersebut adalah batal dan tidak sah. MPPJ dan Mentari merayu terhadap keputusan tersebut. Isu-isu untuk diputuskan oleh mahkamah adalah, antara D lain: (i) sama ada kebenaran merancang yang diberikan oleh MPPJ kepada Mentari berkaitan dengan Cadangan Pembinaan di bawah Akta adalah sah; (ii) mengambil kira fakta-fakta dan dokumen-dokumen semasa, khususnya surat Setiausaha Negeri, sama ada terdapat apa-apa pengecualian atau pengecualian yang sah E diberikan menurut s. 19(2)(g) Akta.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

F **(1)** Permohonan untuk kebenaran merancang mesti dibuat menurut prosedur lengkap yang diperuntukkan di dalam s. 21(1) hingga (8) Akta tersebut, lebih khusus lagi s. 21(6). MPPJ tidak mematuhi peruntukan mandatori iaitu sebelum kebenaran merancang diberikan. Pemberian notis statutori dan G mengadakan perbicaraan statutori oleh MPPJ adalah pencabulan melampau ss. 21(6), 21(7), 22(1) dan 22(2) Akta tersebut, kerana merupakan suatu pertimbangan semula melalui operasi menyelamat untuk membetulkan kesilapan yang jelas. Ketidakpatuhan peruntukan mandatori menjadikan kebenaran H merancang batal dan tidak sah.

(2) Jawapan MPPJ kepada Menteri tidak membuat apa-apa rujukan terhadap pengecualian, yang didakwa diberikan oleh Pihak Berkuasa Negeri di bawah s. 19(2)(g) Akta tersebut, tetapi I semata-mata memberitahu Menteri bahawa kebenaran merancang telah diluluskan. Jika terdapat pengecualian sebegitu, tiada keperluan bagi MPPJ untuk kemudiannya

memulakan proses perbicaraan statutori di bawah s. 21(6) Akta tersebut. Perbicaraan statutori tersebut jelas bertentangan dan tidak konsisten dengan kewujudan pengecualian di bawah s. 19(2)(g). Selanjutnya, tidak ada tanda-tanda atau cadangan bahawa Mentari pada masa itu mengetahui tentang kewujudan pengecualian tersebut.

(3) Satu lagi dokumen semasa adalah surat daripada Timbalan Setiausaha Kerajaan Negeri Selangor (yang juga adalah Setiausaha Majlis Tindakan Ekonomi Selangor ('MTES')) kepada Pegawai Daerah dan MPPJ dengan menyertakan minit mesyuarat Exco MTES. Minit tersebut tidak membuat apa-apa rujukan bahawa MTES telah memberikan pengecualian di bawah s. 19(2)(g). Walau bagaimanapun, hanya Pihak Berkuasa Negeri diberikan kuasa yang relevan untuk memberikan pengecualian di bawah s. 19(2)(g) dan bukan MTES. Dalam keadaan tersebut, pengecualian yang dinyatakan yang didakwa diberikan oleh MTES tidak terangkum di bawah s. 19(2)(g).

Legislation referred to:

Planning Control (General) Rules 2001 (Selangor), Fourth Schedule, r. 7

Town and Country Planning Act 1976, ss. 19(1), (2)(g), 21(1), (2), (3), (4), (5), (6), (7), (8), 21A, 22(1), (2)

For the appellants - *Felix Dorairaj; M/s Dorairaj, Low & Teh*
Dato' V Sivaparanjothi; M/s V Siva & Partners
For the respondents - *Sivarasa Rasiah; M/s Daim & Gamany*
M/s Fernandez & Selvarajah
Ravi Nekoo; M/s Nekoo Parames & Tung

[Appeal from High Court, Shah Alam; Judicial Review No: MT4-13-24-2003]

Reported by S Barathi

JUDGMENT

Low Hop Bing JCA:

Introduction

[1] Before us are the following appeals:

1. Appeal No. B-02-1307-2005 filed by Mentari Housing Development Sdn Bhd ("Mentari"); and

2. Appeal No. B-02-1308-2005 filed by the (then) Majlis Perbandaran Petaling Jaya (MPPJ).

[1A] Appeal No. B-02-435-2004 has been withdrawn by the appellant MPPJ and therefore struck out.

[2] Both these appeals are lodged against the following orders of the Shah Alam High Court:

(1) A declaration that the planning permission purportedly issued by MPPJ on 15 March 2003 to Mentari in respect of the proposed development known as "Cadangan Pembinaan 2 Blok Rumah Pangsa Kos Rendah 12 Tingkat 9594/631 unit Beserta Tapak Fardu Ain dan Gerai di atas Bekas Simpanan Talian Elektrik, Jalan PJS 5/6 dan Jalan PJS 5/12A, Taman Desaria, Petaling Jaya, Selangor Darul Ehsan" ("the proposed development") is null and void as it contravened the Town and Country Planning Act 1976 ("the Act");

(2) A declaration that all development works undertaken by Mentari in respect of the development from the date of commencement of works to the date of filing the suit is null and void as it contravened the provisions of the Act;

(3) MPPJ to pay the applicants damages to be assessed; and

(4) Costs to be paid by MPPJ and Mentari to the applicants.

[3] The High Court also allowed buyers of the low cost apartments (being built by Mentari); and the Selangor State Authority to intervene as interveners.

Factual Background

[4] The applicants in the High Court are residents of Taman Desaria, Jalan Klang Lama, Petaling Jaya and owners of the neighbouring lands in relation to the proposed development which the applicants alleged was illegal and in contravention of the Act, being:

(1) without any valid planning permission from MPPJ; and

(2) inconsistent with the structure plan, thereby turning the area into an urban slump, and transforming the population ratio to ten times what it is supposed to be.

[5] The State Authority had alienated an area measuring 6.11 acres in Taman Desaria to Mentari.

[6] The applicants alleged that the first time they were told about the proposed development was when they received a letter dated 17 April 2003 from MPPJ inviting them to a "Majlis Penerangan" (Information Session) on 24 April 2003.

[7] Being dissatisfied with the proposed development, the applicants *vide* solicitors' letter dated 12 May 2003 addressed to MPPJ specifically asked MPPJ whether it had granted any planning permission to Mentari. MPPJ did not reply.

[8] On 20 May 2003, the applicants wrote to the Minister of Housing and Local Government ("the Minister"), stating their objections to the proposed development.

[9] In early June 2003, construction works for the proposed development began.

[10] On 20 June 2003, applicants' solicitors wrote a second letter to MPPJ, and also to the Selangor Director of Town and Country Planning.

[11] Up to 8 July 2003, MPPJ has not replied to any of the applicants' aforesaid two letters.

[12] On 8 July 2003, under r. 7 of the Fourth Schedule to the Planning Control (General) (Selangor) Rules 2001 (Sel PU 9 dated 21 January 2001), MPPJ issued Form A notices to some of the applicants, notifying them that an application for planning permission has been received and that they have 21 days to object.

[13] The applicants then wrote to MPPJ asking for various documents stipulated in s. 21(1) and s. 21A of the Act. (A reference hereinafter to a section is a reference to that section in the Act). An officer of MPPJ verbally told Dr Ghapor Hussin, a representative of the applicants, that those documents were not available. Although MPPJ did not supply the statutory documents, the applicants lodged their written objections dated 28 July 2003, and sought a hearing pursuant to the Act.

[14] On 11 August 2003, the Director of Town and Country Planning replied to the applicants' letter of 20 June 2003, stating that planning permission for the proposed development is under the jurisdiction of MPPJ.

[15] Despite the statutory hearing being initiated under s. 21 and planning permission not having been granted, works on the proposed development continued.

[16] On 31 July 2003, the applicants sent a letter to MPPJ asking MPPJ to issue a stop work order pending the application for planning permission.

[17] On 12 August 2003, the Minister wrote to MPPJ, with a copy to the applicants, recommending that a stop work order be issued pending the disposal of the application for planning permission.

[18] On 26 August 2003, MPPJ replied to the Minister, (but no copy was sent to the applicants) saying, *inter alia*, that:

(1) The Exco of Majlis Tindakan Ekonomi Selangor (Selangor Economic Action Council – "SEAC") had approved in principle the alienation of the land to Mentari;

(2) Planning permission was approved by MPPJ on 15 March 2003;

(3) An information session was held for the residents on 24 March 2003; and

(4) A hearing of objections would take place on 23 August 2003.

[19] On 23 August 2003, the statutory hearing of objections took place.

Validity Of Planning Permission Dated 15 March 2003

[20] The argument advanced for Mentari is that, prior to commencement of works on 2 June 2003, Mentari had already obtained the requisite planning permission from MPPJ on 15 March 2003, and that the proposed development cannot be said to be in contravention of the Act.

[21] The contention presented for MPPJ is to the same effect.

[22] The applicants supported the learned High Court Judge's view that MPPJ was in flagrant violation of s. 21(6), (7) and s. 22(1), as no statutory hearing was ever held by MPPJ prior to the so-called planning permission.

[23] The question which we must decide is: A

> Is the Planning Permission, purportedly given by MPPJ on 15 March 2003 to Mentari in respect of the Proposed Development, valid under the Act?

[24] In our view, an application for planning permission must be B made pursuant to the detailed procedure prescribed in s. 21(1) to (8), more specifically s. 21(6) which merits reproduction as follows:

> 21. Application for planning permission
>
> (6) If the proposed development is located in an area in respect C of which no local plan exists for the time being, then, upon receipt of an application for planning permission, or, where directions have been given under subsection (3), upon compliance with the directions, the local planning authority shall, by notice in writing served on them, inform the D owners of the neighbouring lands of their right to object to the application and to state their grounds of objection within twenty-one days of the date of service of the notice.

[25] It is immensely important to note that Taman Desaria in E which the proposed development was to be carried out had no local plan, as confirmed by MPPJ's Director of Developmental Planning Department in her affidavit to the effect that "the local plan for Taman Desaria is yet to be completed." The applicants lodged their written objections with MPPJ on 28 July 2003, and F attended the statutory hearing on 23 August 2003 and there raised their written objections to the proposed development under s. 21(7). Nevertheless, MPPJ took no further action thereafter, when it is incumbent on MPPJ to comply with the mandatory requirements under s. 22(1) and (2).

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[26] Section 22(1) reads:

> (1) As soon as possible after the receipt of an application for planning permission, or, if the application is one to which section 21(6) applies, as soon as possible after the expiry of the period H within which objections may be made or, if objections have been made, as soon as possible after the objections have been dealt with under s. 21(7), the local planning authority shall decide on the application for planning permission.

[27] Section 22(2) sets out the particulars which MPPJ must I consider. It reads:

A (2) In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular:

(a) the provisions of the development plan, if any;

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(aa) the direction given by the Committee, if any;

(b) the provisions that it thinks are likely to be made in any development under preparation or to be prepared, or the proposals relating to those provisions;

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(ba) the provisions of the Sewerage Services Act 1993;

(bb) the development proposal report; and

(c) the objections, if any, made under s. 21.

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[28] In our view, s. 21(6) and (7) confer on the applicants a statutory right to be heard, while s. 22(1) and (2) require MPPJ to consider the applicants' objections before planning permission can be granted to Mentari. It is abundantly clear to us that MPPJ has not complied with these mandatory provisions ie, before the purported planning permission was granted on 15 March 2003. MPPJ's issuance of the statutory notices on 8 July 2003 and holding of the statutory hearing on 23 August 2003 were in flagrant violation of s. 21(6), (7); s. 22(1) and (2), being afterthoughts by way of rescue operations in order to remedy a manifest error caused by putting the cart before the horse, so to speak. The effect of such non compliance with the aforesaid mandatory provisions of the Act is to render the purported planning permission null and void. We therefore answer the above question in the negative.

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Exemption From Planning Permission

[29] Alternatively, Mentari, MPPJ and the Selangor State Authority contended that the proposed development did not require any planning permission as it had been exempted by the State Authority under s. 19(2)(g). They relied on the Selangor State Secretary's Letter dated 17 February 2003 addressed to MPPJ's President ("the State Secretary's Letter").

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[30] The applicants took the position that the State Secretary's Letter did not give any exemption under s. 19(2)(g) and that in any event the purported exemption is null and void.

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[31] The learned High Court Judge held that there was no such exemption, or, even if there was, it was null and void. A

[32] Under this head, the question which we have to address is:

> Having regard to the facts and contemporaneous documents, more specifically the State Secretary's Letter, was there any exemption or valid exemption granted pursuant to s. 19(2)(g)? B

[33] To start with, s. 19(1) generally prohibits the commencement, undertaking or carrying out of any development unless planning permission is granted under s. 22. Section 19(1), where relevant, reads: C

> 19. Prohibition of development without planning permission.
>
> (1) No person, other than a local authority, shall commence, undertake, or carry out any development unless planning permission in respect of the development has been granted to him under s. 22 ... D

[34] Exceptions are created under s. 19(2). One such exception is set out in s. 19(2)(g) as follows: E

> (2) Notwithstanding subsection (1), no planning permission shall be necessary:
>
> (g) for the making of such material change in the use of land or building as the State Authority may prescribe to be a material change for which no planning permission is necessary. F

[35] The intention of Parliament as reflected in s. 19(1) is to prohibit any person, other than a local authority, to eg, commence any development without planning permission. Of course, under s. 19(2)(g), no such planning permission is necessary for the making of such material change in the use of the land or building as the State Authority may prescribe to be a material change. G

[36] To answer the above question, it is necessary for us to examine contemporaneous documents. In this regard, the State Secretary's Letter is crucial. Where relevant, it reads as follows: H

> 2. ... mesyuarat EXCO Majlis Tindakan Ekonomi Selangor (MTES) pada 14 Januari 2003, telah pun meluluskan pemberimilikan tanah bekas Simpanan Talian Elektrik seluas 6.11 ekar di Taman Desaria bagi tujuan pembangunan penempatan setinggan Kampung Penaga yang akan dibangunkan oleh Syarikat Mentari Sdn Bhd. I

A 3. ... mesyuarat juga telah membuat keputusan untuk mengkategorikan cadangan pembangunan tersebut menurut kategori yang diklasifikasikan di bawah Seksyen 19(2)(g) Akta Perancangan Bandar Dan Desa 1976, iaitu yang tidak memerlukan kebenaran merancang untuk menjalankan pembangunannya.

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Our Translation:

2. ... the meeting of the State Economic Action Council EXCO on 14 January 2003 had approved the alienation of the ex-Electricity Reserve Land with an area of 6.11ac in Taman Desaria for the purpose of development, to re-settle the squatters in Kampung Penaga, which will be developed by Mentari Co Sdn Bhd.

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3. ... the meeting has also made the decision to categorise the proposed development in accordance with the categories classified under Section 19(2)(g) of the Town and Country Planning Act 1976 i.e which does not require planning permission to carry out the development.

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[37] In relation to the exemption allegedly contained in the State Secretary's Letter, it is necessary for us to refer to MPPJ's reply to the Minister, alluded to in para. 18 of our judgment herein. We note that it made no reference whatsoever to the alleged exemption, but merely informed the Minister that planning permission was approved.

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[38] Had there been such an exemption, there would have been no necessity for MPPJ to subsequently initiate the process for the statutory hearing under s. 21(6). The statutory hearing is clearly repugnant to or inconsistent with the existence of an exemption under s. 19(2)(g).

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[39] Quite apart from that, if there had been such an exemption, Mentari being the developer of the proposed development would certainly be among the first people to have known of its existence. However, there was no indication or suggestion whatsoever that Mentari was at the material time aware of the existence of such exemption.

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[40] Another important contemporaneous document was the letter dated 30 March 2003 which the Selangor Deputy State Secretary (who was also the Secretary of SEAC) wrote to the District Officer and MPPJ. Enclosed therewith was an extract of the

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minutes of the SEAC Exco meeting held on 14 January 2003. The minutes categorically revealed that the decision on 14 January 2003 was purely to approve in principle the alienation of 6.11 acre of Ex-Electricity Reserve Land to Mentari. Again, the minutes made no mention whatsoever that SEAC has granted the exemption under s. 19(2)(g).

[41] In any event, only the State Authority is vested with the relevant power to grant the exemption under s. 19(2)(g). Hence, the State Authority (and not any other person) is the competent authority under s. 19(2)(g).

[42] "State Authority" is defined in the Interpretation Acts 1948 and 1967 to mean "the Ruler or Yang di-Pertua Negeri of a State." The Ruler acts on the advice of the State Executive Council (the State Exco). In law, SEAC is not the State Exco. SEAC is clearly not the authority vested with the power to grant the requisite exemption under s. 19(2)(g). That being the case, the purported exemption which SEAC had allegedly granted does not come within the ambit of s. 19(2)(g). Our answer to the above question is in the negative.

Conclusion

[43] On the foregoing grounds, we are of the view that the learned High Court Judge had not erred in fact or in law in making the aforesaid orders. These appeals being without merits are dismissed with costs of RM25,000 against Mentari and MPPJ respectively. The decision of the High Court is hereby affirmed. Deposits to the applicants on account of the fixed costs. Also MPPJ's deposit in Appeal No. B-02-435-2004 to be paid to the applicants as costs.